

1 Timothy F. Winchester, Esq. (State Bar No. 54826)  
Neil H. Bui, Esq. (State Bar No. 215108)  
2 McINERNEY & DILLON, P.C.  
1999 Harrison Street, Suite 1700  
3 Oakland, California 94612-4700  
Telephone: (510) 465-7100  
4 Facsimile: (510) 465-8556

5 Attorneys for Defendants and Counterclaimant  
Yerba Buena Engineering & Construction, Inc., and  
6 Travelers Casualty and Surety Company of America

7 UNITED STATES DISTRICT COURT  
8 NORTHERN DISTRICT OF CALIFORNIA

9 UNITED STATES OF AMERICA, for the use ) Case No. CV 07 5912 JL  
10 of AAA RESTAURANT FIRE CONTROL, )  
INC., doing business as AAA FIRE )  
11 PROTECTION SERVICES; and AAA )  
RESTAURANT FIRE CONTROL, INC., )

**DEFENDANT TRAVELERS CASUALTY  
AND SURETY COMPANY OF  
AMERICA'S ANSWER TO COMPLAINT**

12 Plaintiff,

13 vs.

14 YERBA BUENA ENGINEERING &  
CONSTRUCTION, INC., a California  
15 corporation; TRAVELERS CASUALTY AND  
SURETY COMPANY OF AMERICA, a  
16 Connecticut corporation; and DOES 1 TO 100,  
inclusive,

17 Defendants.

18 YERBA BUENA ENGINEERING &  
19 CONSTRUCTION, INC., a California  
corporation; and TRAVELERS CASUALTY  
20 AND SURETY COMPANY OF AMERICA,

21 Counterclaimant,

22 vs.

23 UNITED STATES OF AMERICA, for the use )  
of AAA RESTAURANT FIRE CONTROL, )  
INC., doing business as AAA FIRE )  
24 PROTECTION SERVICES; and AAA )  
RESTAURANT FIRE CONTROL, INC.; )  
25 and ROES 1 TO 20, inclusive, )

26 Counterdefendants.  
27

1 Defendant Travelers Casualty and Surety Company of America ("Travelers") answers  
2 the Complaint ("Complaint") of AAA Restaurant Fire Control, Inc. ("AAA") as follows:

3 **JURISDICTION**

4 1. Defendant lacks information or knowledge sufficient to answer the allegations in  
5 paragraphs 1 of the Complaint, and based upon that ground denies each and every allegation  
6 therein.

7 **VENUE**

8 2. Defendant lacks information or knowledge sufficient to answer the allegations in  
9 paragraphs 2 of the Complaint, and based upon that ground denies each and every allegation  
10 therein.

11 **INTRADISTRICT ASSIGNMENT**

12 3. Defendant lacks information or knowledge sufficient to answer the allegations in  
13 paragraphs 3 of the Complaint, and based upon that ground denies each and every allegation  
14 therein.

15 **PARTIES**

16 4. Defendant lacks information or knowledge sufficient to answer the allegations in  
17 paragraphs 4 of the Complaint, and based upon that ground denies each and every allegation  
18 therein.

19 5. Defendant admits the allegations contained in paragraph 5 of the Complaint.

20 6. Defendant denies the allegations of paragraph 6 of the Complaint except that  
21 defendant admits that it is a corporation organized in the State of Connecticut and duly  
22 qualified to do business in the State of California. The allegations of paragraph 6 providing  
23 that defendant is authorized to engage in the business of "acting as a surety on bonds required  
24 or authorized by law" is unintelligible to answering defendant and on that grounds defendant  
25

1 denies the allegation.

2 **FIRST CAUSE OF ACTION**

3 7. Answering paragraph 7 of the Complaint, defendant incorporates by reference  
4 each and every admission, denial and defense to the paragraphs incorporated by reference to  
5 paragraph 7 of the Complaint, as though fully set forth therein.  
6

7 8. Defendant lacks information or knowledge sufficient to answer the allegations in  
8 paragraphs 8 of the Complaint, and based upon that ground denies each and every allegation  
9 therein, except that defendant admits that Yerba Buena entered into a written contract with the  
10 United States National Parks Service to perform certain work on the Alcatraz Island Fire  
11 Protection Improvement Project.

12 9. Defendant lacks information or knowledge sufficient to answer the allegations in  
13 paragraphs 9 of the Complaint, and based upon that ground denies each and every allegation  
14 therein.  
15

16 10. Answering paragraph 10 of the Complaint, defendant admits that it signed a  
17 payment bond for contract no. C8147050044. As to the remaining allegations contained in  
18 paragraph 10, defendant affirmatively asserts that the bond speaks for itself.

19 11. Defendant lacks information or knowledge sufficient to answer the allegations in  
20 paragraphs 11 of the Complaint, and based upon that ground denies each and every allegation  
21 therein.

22 12. Defendant lacks information or knowledge sufficient to answer the allegations in  
23 paragraphs 12 of the Complaint, and based upon that ground denies each and every allegation  
24 therein.  
25

26 13. Defendant lacks information or knowledge sufficient to answer the allegations in  
27 paragraphs 13 of the Complaint, and based upon that ground denies each and every allegation  
28

1 therein.

2 14. Defendant lacks information or knowledge sufficient to answer the allegations in  
3 paragraphs 14 of the Complaint, and based upon that ground denies each and every allegation  
4 therein.

5 15. Defendant denies the allegations contained in paragraph 15 of the Complaint.

6 16. Defendant lacks information or knowledge sufficient to answer the allegations in  
7 paragraphs 16 of the Complaint, and based upon that ground denies each and every allegation  
8 therein.

9 17. Defendant denies the allegations contained in paragraph 17 of the Complaint.

10  
11 **SECOND CAUSE OF ACTION**

12 18. Answering paragraph 18 of the Complaint, defendant incorporates by reference  
13 each and every admission, denial and defense to the paragraphs incorporated by reference to  
14 paragraph 18 of the Complaint, as though fully set forth therein.

15 19. Defendant lacks information or knowledge sufficient to answer the allegations in  
16 paragraphs 19 of the Complaint, and based upon that ground denies each and every allegation  
17 therein.

18  
19 **THIRD CAUSE OF ACTION**

20 20. Answering paragraph 20 of the Complaint, defendant incorporates by reference  
21 each and every admission, denial and defense to the paragraphs incorporated by reference to  
22 paragraph 20 of the Complaint, as though fully set forth therein.

23 21. Defendant lacks information or knowledge sufficient to answer the allegations in  
24 paragraphs 21 of the Complaint, and based upon that ground denies each and every allegation  
25 therein.

26 22. Defendant lacks information or knowledge sufficient to answer the allegations in  
27

1 paragraphs 22 of the Complaint, and based upon that ground denies each and every allegation  
2 therein.

3 **AFFIRMATIVE DEFENSES**

4 23. AS AND FOR A FIRST, SEPARATE AND DISTINCT AFFIRMATIVE  
5 DEFENSE to the Complaint, this answering Defendant alleges that Plaintiff fails to state a  
6 claim upon which relief can be granted.  
7

8 24. AS AND FOR A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE  
9 DEFENSE to the Complaint, this answering Defendant alleges that the Plaintiff, its agents and  
10 employees, and each of them, were negligent in and about the matters alleged in the Complaint  
11 and said negligence proximately contributed to the damages described therein and therefore  
12 bars any recovery herein to the extent thereof.

13 25. AND FOR A THIRD, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
14 to the Complaint, this answering Defendant alleges the Plaintiff is barred in whole or in part by  
15 the doctrine of laches.  
16

17 26. AND FOR A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE  
18 DEFENSE to the Complaint, this answering Defendant alleges that other defendants in this  
19 lawsuit, as well as other persons and entities not parties to this lawsuit, were themselves  
20 responsible for the Plaintiff's damages, if any.

21 27. AND FOR A FIFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
22 to the Complaint, this answering Defendant alleges that the Complaint is barred by the  
23 applicable statute of limitations, including but not limited to Code of Civil Procedure §§ 337,  
24 377.1, 339, 340, 343, 344 and 40 USC 3133(b).  
25

26 28. AND FOR A SIXTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
27 to the Complaint, this answering Defendant alleges that because the Complaint is worded in

1 conclusory terms, this Defendant cannot fully anticipate all affirmative defenses that may be  
2 applicable to the action herein. Accordingly, the right to assert additional defenses, if and to  
3 the extent such defenses are applicable is hereby reserved.

4 29. AND FOR A SEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
5 DEFENSE to the Complaint, this answering Defendant alleges that Plaintiff did not perform  
6 one or more of its obligations under the contract asserted in Plaintiff's Complaint. This  
7 Defendant further alleges that the performance of such of obligations were a condition  
8 precedent to any performance by this answering Defendant in each and every instance.

9 30. AND FOR A EIGHTH, SEPARATE AND DISTINCT AFFIRMATIVE  
10 DEFENSE to the Complaint, this answering Defendant alleges that Plaintiff with the exercise  
11 of reasonable effort and diligence, could have mitigated the damages alleged in the Complaint,  
12 and that such damages, if any, were directly and proximately caused by the unreasonable and  
13 inexcusable failure and neglect of Plaintiff in refusing to act in good faith and to exercise  
14 reasonable diligence in efforts to mitigate the damages alleged.

15 31. AND FOR AN NINETH, SEPARATE AND DISTINCT AFFIRMATIVE  
16 DEFENSE to the Complaint, this answering Defendant alleges that if it failed to perform one or  
17 more of its obligations to Plaintiff under any contract or agreement, Plaintiff waived its rights  
18 to require such performance by its own acts or omissions in each and every instance.

19 32. AND FOR A TENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
20 DEFENSE to the Complaint, this answering Defendant alleges that plaintiff has failed to  
21 comply with the requirements of Civil Code Sections 3183, 3184, 3192, 3210, 3211, 3214, and  
22 3225 through 3252.

23 33. AND FOR AN ELEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
24 DEFENSE to the Complaint, this answering Defendant alleges that it performed all of its  
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1 obligations to Plaintiff under any and all contracts and agreements described in the Complaint,  
2 and pursuant to any novations reached between this answering Defendant, Plaintiff and other  
3 parties. (Civil Code §§ 1530 and 1531.)

4 34. AND FOR A TWELTH, SEPARATE AND DISTINCT AFFIRMATIVE  
5 DEFENSE to the Complaint, this answering Defendant alleges that it performed each of its  
6 obligations to Plaintiff under any and all contracts and agreements described in the Complaint,  
7 and pursuant to all accords between said parties which were subsequently accepted by Plaintiff  
8 and other parties. (Civil Code §§ 1521-1524.)  
9

10 35. AND FOR A THIRTEENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
11 DEFENSE to the Complaint, this answering Defendant alleges that it performed each of its  
12 obligations to Plaintiff under any and all contracts and agreements described in the Complaint  
13 and pursuant to all releases between said parties. (Civil Code § 1541.)  
14

15 36. AND FOR A FOURTEENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
16 DEFENSE to the Complaint, this answering Defendant alleges that Plaintiff acted with full  
17 knowledge of all facts and circumstances surrounding its alleged injuries and damages, and  
18 thus knowingly assumed the risk of injury and damages, should any injury or damages have  
19 occurred.

20 37. AND FOR A FIFTEENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
21 DEFENSE to this Complaint, this answering Defendant alleges that Plaintiff and others  
22 unrelated to this Defendant modified and/or altered the materials, contract or agreements  
23 effecting this Defendant, and that such conduct caused and/or contributed to the damages which  
24 are alleged in this lawsuit.  
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26 38. AND FOR A SIXTEENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
27 DEFENSE to the Complaint, this answering Defendant alleges that Plaintiff is barred in this  
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1 action by the equitable doctrine of unclean hands.

2 39. AND FOR A SEVENTEENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
3 DEFENSE to the Complaint, this answering Defendant alleges that Plaintiff fails to state facts  
4 sufficient to allow for recovery of pre-judgment interest.

5 40. AND FOR A EIGHTEENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
6 DEFENSE to the Complaint, this answering Defendant alleges that Plaintiff failed to comply  
7 with the statutory prerequisites for recovering on any payment bond furnished in relation to the  
8 construction project which is the subject of this litigation.

9 41. AND FOR A NINETEENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
10 DEFENSE to the Complaint, this answering defendant alleges that Plaintiff failed to timely file  
11 its complaint as required under California Civil Code 3249.

12 42. AND FOR A TWENTIETH, SEPARATE AND DISTINCT AFFIRMATIVE  
13 DEFENSE to the Complaint, this answering Defendant alleges that conditions precedent to  
14 Defendant's obligation, if any, have not occurred, including but not limited to, full and/or  
15 partial payment of the contract or retention by owner.

16 42. AND FOR A TWENTY-FIRST, SEPARATE AND DISTINCT AFFIRMATIVE  
17 DEFENSE to the Complaint, this answering Defendant alleges that the liability of Defendant, if  
18 any, is limited solely to proven violations occurring during the effective period of the bond.

19 43. AND FOR A TWENTY-SECOND, SEPARATE AND DISTINCT  
20 AFFIRMATIVE DEFENSE to the Complaint, this answering defendant alleges that the  
21 defendant is entitled to all the defenses of its principal.

22 WHEREFORE, this answering Defendant prays for judgment against Plaintiff as  
23 follows:

24 1. That Plaintiff takes nothing by reason of its Complaint;




1           2.     That this answering Defendant be awarded its costs of suit, expenses and attorney  
2 fees incurred herein, as permitted by law, and pursuant to contract;

3           3.     That the degree of responsibility for damages, if any, be determined in proportion  
4 to the comparative negligence of the liable tortfeasors; and

5           4.     That this answering Defendant be awarded such other and further relief as the  
6 court may deem just and proper.  
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8  
9 DATED: February 7, 2008.

McINERNEY & DILLON, P.C.

10  
11 By   
12 Neil H. Bui  
13 Attorneys for Defendants and Counterclaimants

14 Yerba Buena Engineering & Construction, Inc.,  
15 and Travelers Casualty and Surety Company of  
16 America  
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PROOF OF SERVICE

I declare that I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within action; my business address is McInerney & Dillon, P.C., 1999 Harrison Street, Suite 1700, Oakland, California 94612-4700.

On the date last written below, I served the following documents:

**DEFENDANT TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA'S  
ANSWER TO COMPLAINT**

By placing true and correct copies thereof:

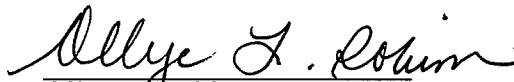
X By Electronic Mail. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons, through [LexisNexis Corporation/the Court's ECF-PACER webpage/or other internet service provider], in which counsel below are registered to receive e-mail at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**ADDRESSEES**

Lawrence E. Smith  
Centerpoint Building  
18 Crow Canyon Court, Ste. 205  
San Ramon, California 94583

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 7, 2008

  
Ollye L. Robinson